

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

<i>In the Matter of R.B., Penn-Harris-Madison</i>)	
<i>School Corporation, and Mishawaka-</i>)	Article 7 Hearing Nos. E1258.01
<i>Penn-Harris-Madison Joint Services</i>)	and 1259.01
)	
Appeal from a Decision by)	
Kristin L. Anderson, Esq.,)	
Independent Hearing Officer)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

The Parent's request for hearing was received by the Division of Special Education,¹ Indiana Department of Education, on November 29, 2001. The Independent Hearing Officer (IHO) was appointed on November 30, 2001. The Parents requested a determination as to whether the Student's inappropriate behavior at school was a manifestation of the Student's disability. This hearing was designated as an expedited hearing under 511 IAC 7-30-5 and was designated as Article 7 Hearing No. E1258.01. The Parents also requested a hearing to determine whether a series of disciplinary suspensions established a pattern amounting to a change in placement. This hearing request was designated as Article 7 Hearing No. 1259.01. A prehearing conference was held on December 4, 2001. At that time it was determined that no disciplinary proceedings were presently pending against the Student. The parties agreed that the Student's current IEP, if implemented, would be appropriate pending the hearing. It was determined that the same witnesses and written evidence would be involved in both hearings. The IHO determined that both hearing requests would be heard in a single proceeding to avoid duplication of evidence and witnesses. The hearing was scheduled for January 10 and 11, 2002, and both parties agreed to extend the decision deadline to January 28, 2002.

At the beginning of the hearing it was disclosed that the attorney appearing for the Student was not also representing the Parents. The Parents requested to appear *pro se* and to question witnesses on their own behalf. The IHO determined that their issues were identical to those of the Student except for the issue involving parental reimbursement for an independent evaluation. It was also apparent that the Parents were relying on the same written and testimonial evidence. The Parents' request to proceed on their own behalf was denied for the sake of good order and the Parents were instructed to present their questions through their Student's attorney. The Parents had frequent and often lengthy consultations with the attorney. The mother testified at length and the Parents were allowed to supplement the attorney's closing argument with argument of their own.

On the second day of the hearing it became apparent that another full day would be needed to finish the presentation of evidence. The hearing was continued to January 22, 2002, and the parties agreed to

¹The Division of Special Education is now the Division of Exceptional Learners.

extend the decision deadline to February 11, 2002.

The Parents had previously filed two complaints with the Indiana Department of Education, Division of Special Education. Complaint No. 1707.01 was filed on March 7, 2001. Complaint 1771.01 was filed on June 5, 2001. Both complaints were resolved prior to the current proceedings.

The issues for hearing were identified as:

1. Whether the case conference committee has appropriately identified all of the Student's areas of disability.
2. Whether the Student's current IEP provides an appropriate educational program for the Student.
3. Whether the Student's behavior leading to suspensions from school in March, October and November 2001 was causally connected to his disability.
4. Whether Respondents have taken actions breaching the Student's right to confidentiality, including their allowing law enforcement authorities to question the Student without parental notification and consent.
5. Whether the Student has been excluded from certain extracurricular activities by reason of his disability.
6. Whether the Student's suspension from school for verbal aggression on March 22, 2001 was a violation of the behavior management plan included in the Student's IEP.
7. Whether Respondents should pay for Dr. Rupley's summer 2001 evaluation of the Student.

The IHO issued her written decision on February 8, 2002. From the testimony and evidence presented at the hearing, the IHO determined forty-eight (48) Findings of Fact and reached twenty (20) Conclusions of Law from which she issued one Order.

The IHO's Findings of Fact

The Student had a complete psycho-educational evaluation in 1997. The information from that evaluation was updated in 2000 and became the Student's triennial evaluation. In the summer of 2001, the Parents obtained an extensive independent evaluation from the Student's psychologist. That evaluation was shared with Respondents. The independent evaluation did not fully meet the requirements of Article 7 in that it did not contain information about the Student's current functioning in the school environment. Respondents observed the Student in the classroom and obtained information on the Student's current academic functioning and behavior.

The Student's psychologist considers the Student's Attention Deficit Hyperactivity Disorder (ADHD) to be in the mild range. The major feature of ADHD that is currently being expressed, despite medication, is impulsivity. The parties are in agreement that the Student is still eligible for services for an other health impairment (OHI) by reason of his ADHD.

The Student's testing did not reveal a severe discrepancy between his academic achievement and his normal or near normal potential. The Student's psychologist has diagnosed him as having the following conditions in addition to ADHD: Dysthymia, Oppositional Defiant Disorder, and Narcissistic and Avoidant personality disorders.

The Student is eager to participate in classroom activities. He has friends and enjoys taking a leadership role. The main classroom behavior of concern during the 2001-2002 school year is his making negative comments to other students during class discussions. The Student enjoys school and participates in classroom activities to a high degree. Suspension is an effective consequence for the Student because it temporarily disrupts the sense of importance he receives for that involvement. In addition, the Student does not like the extra time and effort he must expend to make up work missed during a suspension.

The Student has experienced some "ups and downs" in his moods, for example, when he was dismissed from the football team. These moods last approximately from two days to two weeks. His educational performance in specific classes has also varied from time to time. These fluctuations in mood and performance are neither so frequent, nor so long lasting, nor so severe as to be atypical of nondisabled teenagers. From time to time the Student's grades have declined in certain subjects while remaining average or improving in other subjects. In many situations declining grades can be explained by a failure to turn in homework or failure to retake tests per the accommodations in the Student's IEP. The Student also fails to request special assistance in the resource room. The Student's overall educational performance remains consistent with his average intellectual abilities.

The Student's case conference committee (CCC) included all necessary members. The CCC had before it a complete psycho-educational evaluation upon which to base decisions concerning the Student's eligibility for services and an appropriate educational program. A psychologist of the parent's choosing performed a number of tests and prepared an independent evaluation. The results of those tests were accepted and considered by the CCC. The parties have agreed upon an IEP for the Student that includes behavioral intervention strategies. However, the Parents believe it wrong to suspend the Student for verbal aggression. The Student's verbal aggression is sometimes intended to instigate physical aggression. It is appropriate that the Student's IEP not interfere with the School's ability to suspend the Student for verbal aggression.

During the time period addressed in this proceeding, the Student received disciplinary referrals for the following incidents:

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| March 2, 2001 | Unconfirmed absence (verbal reprimand, Saturday school). |
| March 5, 2001 | Physical aggression (verbal reprimand, 3 day suspension). |
| March 15, 2001 | Complaint received of physical aggression 3 and 6 weeks earlier. |
| March 16, 2001 | Disrespectful to a teacher. |
| March 21, 2001 | Sexual harassment. |
| March 22, 2001 | (verbal reprimand, 3 day suspension for complaint received March 15, 2001). |
| October 10, 2001 | Driving to school in violation of school policy (cited for driving and parking violations). |
| October 12, 2001 | Verbal and physical aggression (verbal reprimand, 5 day suspension). |
| November 15, 2001 | Sexual harassment (verbal reprimand, 3 nights "Principal's Detention"). |

November 28, 2001 Use of profanity, physical aggression (verbal reprimand, 3 day suspension).

The Student has had a history of physical aggression within the school setting. The physical aggression declined significantly during the Student's sophomore year. Most, if not all, incidents of physical aggression were preceded by verbal interchanges, frequently initiated by the Student. The Student has had a history of verbal aggression and insubordination within the school setting. The incidents of verbal aggression have declined significantly during the Student's sophomore year. There were no reported classroom incidents of verbal aggression or insubordination toward classroom teachers during the calendar year 2001.

The Student has had a history of making negative comments to other students in the classroom. During the current school year (2001-2002), these "put-downs" ceased immediately upon teacher intervention and re-direction. The Student's parents have taught him strong positive values and set high behavioral standards for him. The Student is well aware of which of his behaviors are not appropriate. The Student gets attention for his aggressive behaviors. There is evidence that this attention makes him feel important and superior to his classmates for the moment. The Student understands the impact and probable consequences of his behavior. He knows that there will be more severe consequences for disrespecting his teachers than for disrespecting his peers.

The Student is eager to demonstrate that he knows the answers to the teacher's questions in the classroom. He receives attention from the teacher and his peers whether or not his comments are aggressive or otherwise inappropriate. The Student tends to feel he gains status with friends by intimidating specific peers and by making less well-off peers feel bad. Therefore, much of his aggressive behavior is purposeful rather than the result of impulse. A common feature of the incidents reported in March and October, 2001, is the Student's prior contacts of a similar nature with the other persons involved. The incidents leading to discipline were not the result of a momentary impulse but rather a purposeful continuation of prior interactions. The Student has demonstrated the ability to modulate his response to school situations, particularly as they involve teachers. The Student has a pattern of intimidating and "putting-down" specific peers. These facts indicate that the recipients of the Student's aggression are often people he targets rather than persons who just happen to be around when an impulse hits the Student.

The Student has shown the ability to control his behavior and make a decision to leave angry and confrontational situations or discontinue angry exchanges. The incidents of profanity, inappropriate language and sexual comments reported on November 15, 2001, are consistent with the impulsive behavior that is a feature of the Student's ADHD/OHI.

Shortly after winter break the Student made comments in class to the effect that he and another student had gotten drunk and vomited in the shower over the winter break. The teacher tried to redirect the discussion, but the Student continued to bring up the alleged incident. The teacher discussed the statements with another teacher who was a mentor to him. The teacher had the boys attend a presentation on teen drinking being given to a class of seniors by two officers from the Indiana State Police. Prior to their presentation, the teacher told the officers about the alleged incident and the officers agreed to talk to the boys personally after class. The teacher introduced the boys to the officers and left the area, periodically returning and taking part in the conversation. There is no substantial evidence that

the officers restrained or interrogated the boys about the alleged events of the winter break.

All sophomore football players received notice that attendance at regularly scheduled practices is mandatory and that they will be cut from the team for missing practice. The players are expected to attend practice even if they are injured and unable to physically participate in the activities. The Student missed practice several times, but his absences were excused because he gave believable reasons for his absences. Complaints were made because several students had been cut from the team who had fewer absences than the Student. The Student was personally notified by the head coach that he would be cut from the team if he missed any more practices. The Student missed several more practices and did not give any reason for those absences.

In March 2001, the parties were in agreement that the Student's IEP, which included a behavioral contingency plan, was appropriate to meet his needs. Out-of-school suspension was checked to be an appropriate consequence for physical aggression but was not an option checked as being appropriate for verbal aggression. The suspension of March 22, 2001 was for three different series of events: Insubordination reported on March 16, 2001; Sexual Harassment reported on March 21, 2001, and physical aggression reported on March 15, 2001.

The Student had a complete psycho-educational evaluation in 1997. That evaluation included a report from an independent psychologist. In 2000, a triennial evaluation updating the information from 1997 was completed by the School. In early June, 2001, the Parents expressed a desire to have more current information from the psychologist and to have his 1997 testing updated. The Director of Special Education informed the Parent the Respondents would perform that testing at no cost to her. The parties held a CCC meeting in August, 2001. At that time, the Parent presented Respondents with a two-paragraph summary of an independent evaluation that was conducted in July, 2001. It was the understanding of the parties that a copy of the complete evaluation would be provided to Respondent as soon as it was available. After a period of time, not having received a copy of the independent evaluation, Respondents sought the Parents' permission to proceed with the testing themselves. Respondents located a copy of the independent evaluation shortly thereafter. Though quite extensive, the independent evaluation did not contain information about the Student's functioning in the school setting. The School then gathered the remaining information needed to fulfill the requirements of Article 7 and completed the evaluation.

The IHO's Conclusions of Law and Order

Based on these forty-eight (48) Findings of Fact, the IHO determined twenty (20) Conclusions of Law. The IHO determined the Student continues to qualify for special education and related services as a student with an other health impairment. The Student is not eligible for special education by reason of a learning disability or an emotional disability. The Student's IEP, including the Behavioral Intervention Plan, remain appropriate for the Student.

The Student's disability did not impair his ability to understand the impact and consequences of his behavior. All disciplinary incidents with the exception of the incidents reported on November 15, 2001, evidence the Student's ability to either purposefully rather than impulsively, engage in inappropriate conduct or to temporarily disengage and reconsider a course of behavior that may have started on

impulse. The Student's disability did not impair his ability to control the behaviors subject to disciplinary action. Only the incidents reported on November 15, 2001, were a manifestation of the child's Other Health Impairment/ADHD.

The statements made by the Student relating to the alleged drinking episode were made in the presence of other students who were free to repeat that information. The statements were not educational records and the Student had no reasonable expectation of privacy in statements he made in open class. The Student's name, however, is considered personally identifiable information under the Family Educational Rights and Privacy Act (FERPA). The disclosure of the Student's name to the police officers was a violation of FERPA.

The Student missed several mandatory team practices without explanation and with no evidence that his absence was connected to his disability. The Student was not excluded from team membership by reason of his disability.

The Student's behavior management plan listed out-of-school suspension as an appropriate consequence for physical aggression but not for verbal aggression. The suspension of March 22, 2001, included an incident of physical aggression. That suspension was not a violation of the Student's behavior management plan.

The Student's triennial reevaluation was conducted in 2000 and another reevaluation was not mandated by Article 7 until 2003. There is no evidence the Parents informed Respondents that they disagreed with any part of the reevaluation of 2000. Respondents offered to perform the testing that the Parents desired at no cost to them. That offer did not amount to an admission that the educational evaluation done a year earlier was not appropriate. There is no provision in Article 7 that entitles parents to reimbursement for an independent evaluation that the parent chooses in lieu of the public evaluation. The Parents are not entitled to reimbursement for their independent evaluation performed in 2001.

Based on the foregoing, the IHO ordered Respondents to give assurances to the Indiana Department of Education that they have devised appropriate policies and procedures relating to the disclosure of information regarding students. The policies and procedures are to comply with the provisions of FERPA and Article 7.

The IHO notified the parties of their right to seek administrative review.

Procedural History of the Appeal

On February 26, 2002, the Parents requested a sixty-day extension of time in which to file their Petition for Review. On February 27, 2002, the Board of Special Education Appeals (BSEA) granted this request, such that the Parents' Petition for Review was to be filed by April 29, 2002. The time for the BSEA to review the petition and issue a written decision was extended to May 29, 2002. The Parents filed a complaint with the Division of Exceptional Learners on March 15, 2002. The complaint was referred to the BSEA for its determination as to whether the complaint issues were related to the hearing pending before the Board. The BSEA determined the complaint issues were related to the hearing procedures on administrative appeal. The Parents requested the complaint be returned to the Division of

Exceptional Learners for completion of the complaint investigation. Federal law requires the BSEA to subsume these issues as part of the administrative appeal. The Parents also requested another 45-day extension of time in which to file their petition for review. This motion was granted in part, as the Parents had previously been granted a lengthy extension of time. The time for the Parents to file their petition for review was extended until May 9, 2002, with the timeline for the final decision extended until June 10, 2002. The Parents also requested a subpoena for the production of documents. The subpoena was provided to the Parents. The Parents filed their Petition for Review on May 9, 2002. On May 9, 2002, the School requested an extension of time until June 3, 2002, in which to file its reply. The BSEA granted the School's request for an extension of time such that the School's reply was due to be filed on or before June 3, 2002. The timeline for the final decision was extended until June 24, 2002.

Parents' Petition for Review

On May 9, 2002, the Parents filed their Petition for Review. The Student is no longer represented by counsel. In the Petition, the Parents claim a violation of their due process rights, disagree with numerous findings of fact and conclusions of law, and allege the IHO failed to rule upon several issues in the hearing. The Parents allege violations of 511 IAC 7-30-3(1)(2), (3), (4) and (5). Specifically, the Parents claim they were prohibited from presenting evidence and questioning witnesses; evidence was introduced that had not been disclosed at least 5 business days prior to the hearing; the separation of witnesses order was violated by School witnesses; and the Parents were not provided a copy of the transcript in a timely manner. The Parents also state the IHO did not provide them with a copy of the written decision. The Parents claim a violation of 511 IAC 7-30-5 which provides for expedited hearings, stating that their two hearing requests were consolidated and the timelines extended without their agreement.

The parents allege that a number of the IHO's findings of fact and conclusions of law are arbitrary and capricious, an abuse of discretion, contrary to law, a constitutional right, power, privilege or immunity, in excess of the IHO's jurisdiction, reached in violation of an established procedure, or unsupported by substantial evidence. The Parents specifically object to the following findings of fact: 1.3, 1.8, 1.9, 2.1, 2.3, 2.4, 2.5, 3.1, 3.2, 3.3, 3.4, 3.8, 3.9², 3.10, 3.11, 3.12, 3.13, 4.3, 4.4, 4.5, 5.3, 5.5, and 7.3. The Parents object to the following conclusions of law: 1.1, 1.2, 1.4, 2.1, 2.2, 3.1, 3.2, 3.3, 4.2, 5.1, 6.2, 6.3, and 7.1.

The Parents also claim violations of Article 7 were not addressed by the IHO and the IHO failed to rule upon several issues in the hearing. The Parents claim a violation of 511 IAC 7-17-18 and 511 IAC 7-25-7, as the School never received parental written consent for an additional evaluation. The School also violated 511 IAC 7-17-13(b), subjecting the Student to multiple suspensions that constituted a pattern because of their proximity. The Parents further claim they still have not received the following documents: sign-in sheets for the CCCs on 4/21/01, 5/10/01 and 6/4/01; minutes from the re-entry conference, and a statement from M.B.

The BSEA has also identified the following issues from the Parents' complaint:

²The Parents listed "3.8" twice. Contextually, it appears the Parents meant to include Finding of Fact 3.9.

1. The public agency allegedly failed to provide the Parent with a complete copy of the Student's educational record as necessary for the due process hearing. 511 IAC 7-23-1(c).
2. The public agency allegedly failed to provide the Parent with a complete copy of the Student's educational record as necessary to appeal an adverse due process hearing. 511 IAC 7-23-1(c).

The Parents further "offer" the following as potential Article 7 violations:

1. 511 IAC 7-30-3(1)(8) - (a party to a due process hearing has the right to obtain from the other party all evaluations completed and recommendations based on the offering party's evaluations that the party intends to use at least five (5) business days prior to a hearing.
2. 511 IAC 7-23-1(c)(1) through (4) - (the right to inspect and review educational records includes the right to an explanation, the right to have other arrangements made to inspect and review or to receive copies of the record if the failure to provide those copies would prevent the parent from exercising the right; the right to have a representative inspect and review the record; and the right to receive a copy of the student's record for use in a pending due process hearing.)
3. 511 IAC 7-23-1(f)(1) through (3) - (the public agency shall comply with a request to inspect and review a student's record without unnecessary delay, before a meeting regarding an IEP, manifestation determination, or a due process hearing, and in no case more than forty-five (45) days after the request.)
4. 511 IAC 7-23-1(i) - (the public agency shall maintain a record of each request for access to and disclosure of personally identifiable information from the educational record of each student, except when the disclosure has been by or to the Parent.)
5. 511 IAC 7-23-1(m)(3) - (the public agency shall include in the educational record of a student with a disability a statement of any current or previously disciplinary action that has been taken against the student, including any other information that is relevant to the safety of the student and other individuals involved with the student.)
6. 511 IAC 7-27-3(d)(1) and (2) - (the general education teacher shall participate in the development, review, and revision of a student's IEP, including positive behavioral interventions and strategies for the student and supplementary aids and services, program modifications, or supports for school personnel that will be provided for the student.)
7. 511 IAC 7-27-1(b)(1) - (the public agency shall provide information and training that addresses the requirements set forth in Article 7 to enable the public agency staff to have the necessary knowledge to arrange and document case conference committee meetings.)

School's Reply to Petition for Review

The School's Reply was timely filed. The School argues that the IHO ruled that although the Parents were parties *pro se* and had the rights of parties, their cross examination, presenting of evidence and confrontation of witnesses would have to go through the Student's attorney for purposes of reducing confusion and keeping the hearing organized. The Student's attorney was given ample opportunity to listen to the Parents' concerns and voice their case. The mother was permitted to give closing argument. The Parents' rights were not infringed upon. The IHO consolidated the two hearing requests at a prehearing conference conducted on December 4, 2001 with agreement of the parties. No objections were made. As there was no pending disciplinary action, an expedited hearing was not required. The Parents have not presented any evidence that any discussion of testimony took place in violation of the separation of witnesses order. The Parents did not request a copy of the transcript from the IHO, but did receive a copy of the transcript when they requested a copy from the Division of Exceptional Learners. The lack of parental consent for the School's evaluation was not raised as an issue in the due process hearing and can't be raised for the first time on appeal. However, the School argues that consent wasn't required as the School had initial permission for an education evaluation and there was no need for

further parent permission. The School further argues that the IHO's findings of fact and conclusions of law are supported by the evidence presented at the hearing, and that the IHO's decision should be upheld.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on June 11, 2002, to conduct its review of the above-referenced matter without oral argument. All three members were present and had reviewed the record, the petition for review, and reply. The Indiana Board of Special Education Appeals now finds and concludes as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
 - a. arbitrary or capricious.
 - b. an abuse of discretion.
 - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
 - d. in excess of the jurisdiction of the IHO.
 - e. reached in violation of an established procedure.
 - f. unsupported by substantial evidence.511 IAC 7-30-4(j).
3. The Petition for Review takes exception to Findings of Fact: 1.3, 1.8, 1.9, 2.1, 2.3, 2.4, 2.5, 3.1, 3.2, 3.3, 3.4, 3.8, 3.9, 3.10, 3.11, 3.12, 3.13, 4.3, 4.4, 4.5, 5.3, 5.5, and 7.3 and Conclusions of Law: 1.1, 1.2, 1.4, 2.1, 2.2, 3.1, 3.2, 3.3, 4.2, 5.1, 6.2, 6.3, and 7.1. The Petition further alleges violations of the Parents' due process rights.
4. The Parents raise numerous issues regarding the procedures employed by the IHO in the conduct of the hearing. As a part of any review, the BSEA is required to review the record to ensure that the due process procedures of 511 IAC 7-30-3 are provided to the parties. See 511 IAC 7-30-4(j). In this dispute, the Parents claim to have standing apart from the Student for whom they obtained legal counsel. However, the Parents fail to state how their claims are in any material way different from the Student's claims. The Parents' rights will typically be considered derivative of the Student's except where there would be a conflict. No such conflict is apparent in this record, and the Parents do not allege such conflict. The IHO is responsible for the conduct of the hearing. Her procedures were consistent with 511 IAC 7-30-3 and I.C. §§4-21.5-3-26, 4-21.5-3-27. The Parents do not state what evidence they were prevented from introducing or what areas of legitimate inquiry they were otherwise prevented from engaging in. The so-called "five-day rule," whereby a party can prohibit the introduction of evidence at a hearing that was not disclosed five (5) business days prior to the hearing, is not an absolute rule. Rather, it is subject to the discretion of the IHO. The BSEA does not find that the IHO abused her discretion in this regard. The Parents were not denied a copy of the

transcript, timely or otherwise. Any confusion regarding receipt of a copy of the transcript was occasioned by the Parents themselves. In any case, a copy of the transcript was provided and the Parents were granted extensions of time in order to review the transcript, prepare a Petition for Review, and file the Petition for Review.

5. The Parents allege the School violated the IHO's order that witnesses be separated and not communicate to one another the substance of their testimony until the completion of the hearing. It is alleged by the Parents that several of the School witnesses went to lunch together. While this may have been an unwise decision on the School witnesses' parts, the Parents did not bring an objection to the IHO, who could have inquired as to the substance of the conversation and taken whatever appropriate corrective action may have been warranted. Because the record does not indicate either the substance of any lunchtime conversation or a timely objection, the issue is waived.
6. Although the Parents assert that a tape recording of a conference would indicate inconsistencies in the testimony of certain School witnesses, the Parents do not state what sort of inconsistencies would have been demonstrated nor do the Parents assert that they were denied the opportunity to present testimonial evidence on their own regarding the conversations they heard. No error can be found.
7. The pre-hearing orders, subsequent orders, and the record as a whole indicate that the parties agreed to consolidate the matters, in part for judicial economy, but also because testimony and evidence took longer than originally anticipated. The Parents did not object. The record reflects agreement of the parties. The IHO did not err by consolidating the matters or granting extensions of time at the request of any party. It should be noted that the parties do not have to be in agreement. An extension of time need be based on one party's request. To the extent the Parents had some objection, by not raising it with the IHO, this issue is waived on administrative appeal.
8. The Parents also raise other tangential claims, including claims the School did not obtain parental consent prior to conducting an evaluation and the School impermissibly changed the Student's placement. The School objected, noting that these issues were not raised at the hearing. The School's objection has merit. Under 511 IAC 7-30-4(g) provides in relevant part that "Only matters raised in the initial due process hearing may be raised in a petition for review." The Parents did not raise these issues with the IHO although there was ample opportunity to do so. The issues are waived.
9. The Parents raise numerous issues regarding access to the Student's educational record. These issues are redundant. The IHO has adequately addressed the issues related to 511 IAC 7-23 and has ordered the School to prepare written assurances to the Division of Exceptional Learners regarding its maintenance, storage, and destruction of educational records, as well as its criteria for disclosing personally identifiable information from such educational records. The BSEA, as noted *infra*, upheld this Order, with a minor modification for clarification purposes. No further action is required regarding the Parents' issues under 511 IAC 7-23.
10. The Parents' complaints regarding the conduct of the manifestation determination were part of the hearing issue on this matter. The IHO has made pertinent findings and legal conclusions that are adverse to the Parents' view. The IHO's decision in this regard was not clearly erroneous. Accordingly, the IHO's decision in this regard is sustained.

11. The Parents also allege that the School violated 511 IAC 7-27-4 by implementing an IEP that was more than twelve months old. See also 511 IAC 7-27-7(d). The Parents are correct on this point. However, the record indicates the parties were continuing to discuss the Student's program during this period of time, finally achieving agreement on the academic portion of the Student's IEP if not the behavioral intervention plan (BIP). The violation is, given the context of the issues in this matter, a technical one for which no additional corrective action is warranted.
12. The Parents challenge numerous Findings of Fact, which have been listed *supra*. A Finding of Fact is a relevant fact derived from the relevant evidence and testimony supplied during the course of the due process proceedings. For a Finding of Fact not to be a Fact, there would have to be no basis in the record or the basis is so unreliable that reliance constitutes an abuse of discretion or arbitrary and capricious decision making. All of the challenged Findings of Fact, however, are supported by the record. It does not matter that other Findings of Fact may have been made or could have been made by a different adjudicator. What does matter is that this adjudicator relied upon relevant, competent evidence and testimony, and her Findings of Fact are supported by same. Given the above, the BSEA sustains the Findings of Fact of the IHO. This includes the factual findings regarding the appropriate constitution of the Student's CCC. Much is made of the absent "sign in" sheets, and their absence is somewhat of a mystery. However, neither IDEA nor Article 7 require the use of "sign in" sheets at CCC meetings. The School acknowledged that it could not locate the sheets. Notwithstanding, the parties were able to provide testimony as to who was and was not present at the CCC meetings. Any technical errors committed by the IHO were just that and nothing more. There are no substantive errors in her fact-finding.
13. The IHO's Conclusions are legal conclusions that are drawn from the fact-finding addressed *supra*. The Parents pose objections to numerous Conclusions of Law (see list *supra*), but with one exception, all of the IHO's Conclusions of Law are based upon the Findings of Fact. The BSEA upholds all the challenged Conclusions of Law (and the ones that were not challenged), except for Conclusion of Law No. 6.3.
14. Conclusion of Law No. 6.3 reads in its entirety: "Kevin McDowell, General Counsel for the Indiana Department of Education, has concluded that there is no legal basis for including a 'no-suspension' clause in an IEP. (See Respondent's [Exhibit] 4QQ, page 408.) The violation of such a clause (here, suspending the child for verbal aggression alone) would not be a violation of his right to an appropriate education." The referenced document is actually a print-out of an e-mail response forwarded from the Division of Exceptional Learners. The actual text of the statement in the e-mail is the following: "Manifestation Determination is to address behavior that has occurred (or is alleged to have occurred). This would not be done 'in advance' of such behavior. Where untoward behaviors are contemplated, that is the function of a BIP (and an FBA, where warranted). There is no legal basis for placing in an IEP a 'no suspension' clause." The IHO misreads and then misapplies the e-mail statement. The second part of her Conclusion does not logically follow the first part. While placing a 'no suspension' clause is not legally required, and would be considered peculiar, if such a clause were placed in a BIP/IEP, it would be a requirement and a violation might constitute a denial of FAPE. Because this Conclusion of Law is without foundation and is otherwise superfluous to the decision, this Conclusion of Law is stricken.
15. The IHO's order requires the School "to give assurances to the Indiana Department of Education that

they have devised appropriate policies and procedures relating to the disclosure of information regarding students. These policies and procedures are to comply with the relevant provisions of FERPA and Article Seven. Respondents are also to advise the Department of how school personnel have been made aware or will be made aware of said policies and procedures.” The BSEA finds this Order addresses many of the outstanding allegations by the Parents regarding irregularities by the School in its maintenance of educational records, as well as access and disclosure concerns. The BSEA amends this Order by directing that such policies and procedures not only comply with the Family Educational Rights and Privacy Act (FERPA) and Article 7, but also comply with the Individuals with Disabilities Education Act (IDEA). There are some variations between FERPA and IDEA. These variations are likely included within Article 7, but given the number of issues raised in this regard, it would be prudent to ensure that IDEA is specifically addressed.

ORDERS

1. In consideration of the foregoing, the Order of the IHO is to be implemented as revised by the BSEA.
2. Conclusion of Law No. 6.3 is to be stricken.
3. Any other matter, motion, or issue not directly addressed in this decision shall be deemed denied or overruled, as appropriate.
4. In all other respects, the IHO’s decision is affirmed.

Date: June 12, 2002

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-30-4(m).